Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA, *Plaintiff*	§	
V.	§	**CRIMINAL ACTION NO. C-06-563**
CITGO PETROLEUM CORPORATION, CITGO REFINING AND CHEMICALS COMPANY, L.P., *Defendants*	§	

MOTION OF COMMUNITY MEMBERS TO BE DECLARED VICTIMS UNDER THE CRIME VICTIM RIGHTS ACT

COME NOW, JAMES GALLOWAY, JOEL MUMPHORD, ROSALINDA ARMADILLO, JEWELL ALLEN, MAVIS BRANCH, FELICIANO CANTU, ROBE GARZA, DIANA LINAN, THELMA MORGAN, JAMES SHACK, JEAN SALONE, JULIAN GARCIA, JOHN GARCIA, and BETTY WHITESIDE (hereinafter "community members"), individuals who move pursuant to the Crime Victim Rights Act, 18 U.S.C. § 3771(d)(1), for the Court to recognize them as crime victims.

On June 27, 2007, a jury found Defendants guilty of violating the Clean Air Act by operating two tanks as oil-water separators without properly covering them, crimes which caused benzene and other dangerous petrochemicals to be released into the surrounding neighborhoods. All the community members were, at the time of the crimes for which Defendants have been convicted, homeowners, residents, or worked in two neighborhoods that were adjacent to the refinery operated by Defendants. The Government previously moved to have 300 people (including the community members who bring this motion) who were exposed to noxious fumes from the tanks designated as victims. The Government argued that evidence was sufficient to prove that these persons had manifested direct health harms from the fumes. CITGO moved to

exclude the victims by alleging that those exposed did not qualify as victims under the Crime Victim Rights Act, 18 U.S.C. § 3771(e), (CVRA). Following the legal path presented by CITGO, the Court ultimately held that the exposed individuals were not victims because the Government had failed to prove specific harmful health injuries directly flowing from the crimes.

Under the CVRA, the community members are entitled to file their own motion to be declared CVRA victims. *See* 18 U.S.C. § 3771(d)(1). The community members now present two new arguments, never advanced by the Government, to be recognized as "victims." First, the fact that CITGO's crime forced them to breathe noxious fumes is – in itself – sufficient "harm" to confer victim status on them under the CVRA. Second, the fact that CITGO criminally placed them *at risk* of future physical injuries is sufficient "harm" to confer victim status.

FACTUAL BACKGROUND

The community members believe that the record contains sufficient evidence for them to be recognized as victims under the CVRA. Accordingly, the community members adopt the factual record presented by the Government at the previous ten-day hearing, as well as the legal arguments presented earlier. The government designated several community members to testify as representatives of the 300 exposed individuals whom the government identified as victims. However, the following community members who are included in this motion did not testify at the pre-sentencing hearings: James Galloway, Feliciano Cantu, Jewell Allen, Mavis Branch, Robe Garza, Julian Garcia, John Garcia, and James Shack. The community members would highlight the following points in the existing record.

A. Testimony Regarding Noxious Fumes

At the pre-sentencing hearings several community members testified about noxious odors released from the CITGO refinery during the time period when CITGO was illegally operating

the tanks in question. One of the victim representatives, Rebecca Zamora, testified that she endured "ugly odors" for years. Testimony of Rebecca Zamora, April 28, 2008, Tr. 207:25-208:4. She further testified:

> Well, I remember a sweet odor, a sweet odor. We couldn't—we didn't know what it was, but we could smell that it was sweet, and then we would get another one that—one that would smell like Band Aid or something like that and then another one that would smell like something was rotten, rotten eggs. By that time, we already had window units, but it didn't make any difference because we could still smell the smells inside the house. Whether you had the windows open or you had them closed, you could still smell them.

Id. at 208:10-19. Thelma Morgan testified to a turpentine like smell. Testimony of Thelma Morgan, April 28, 2008, Tr. 229:13-15. Rosalinda Armadillo testified that the smells were sometimes so strong that she slept with a handkerchief over her face to attempt to block them. Testimony of Rosalinda Armadillo, April 29, 2008, Tr. 68:3-9. Betty Whiteside also testified to bad smells, "Well, it was—it was a joy, you know, living there. The only problem that we had, you know, was smells from the refinery, but that was my mother and father's first time buying a house, and, you know, when older people get old, the don't ever like to move away, you know." Testimony of Betty Whiteside, April 29, 2008, Tr. 101:1-5. She further stated:

> I always keep masks in my car, because I would go to work in the morning at 6:30, and I would leave at 6:00 because I had to be at work at 6:30, and sometimes I would smell the fumes and I didn't really have insurance at the time because I had to let my insurance go because it got too high and I couldn't afford it. So, what I did, I invested in humidifiers. I put them in the bedroom, the living room, and in the hallway, and I always kept my windows closed because I didn't want to get any, you know, smells from the refinery in the house, so I kept my—in fact, I went as far as nailed my windows down. So even when I had guests that come over there, they wouldn't raise the windows, you know because we had a central air and heating unit, but the humidifiers helped me to be able to stay there because, one time, I did have problems and I went to Dr. Bobby Howard, and he was the one that suggested that

> since I didn't have insurance to go to a doctor, he suggested that I get the humidifiers to, you know, help me breathe because, sometimes, you would have a hard time breathing, but I always kept the masks. I would go to Wal-Mart and buy the masks, and, you know, I would just make it a habit, when I'd go in and out of the house, I would always put it on, you know, and I kept them in the car and kept them in the house.

Id., 103.3-104.1. Diana Linan also testified to a "sweet gas smell." Testimony of Diana Linan, April 29, 2008, Tr. 177:17. Joel Mumphord described a strong gas smell that left a bitter taste in the mouth. Testimony of Joel Mumphord, April 29, 2008, Tr. 223:13).

Pursuant to Federal Rule of Evidence 201, the Community Members request the Court take judicial notice of the fact that the sweet, gasoline like smells described by them is consistent with the smell of benzene. *See, e.g., Tox Guide for Benzene,* U.S. Dept. of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry; http://www.atsdr.cdc.gov/toxguides/toxguide-3.pdf?id=39&tid=14.

B. Testimony Regarding Mental Harm

The existing record also contains ample testimony about mental harm suffered by those living near the CITGO refinery. For example, victim representative Rebecca Zamora testified:

> Well, it was very, very stressful, sir. It was so stressful. It's very hard for me to talk about it because I spent so many years there. I know I'm not supposed to hate or feel this way, but I do, I do. Because of all the damages that they did to my property, to my kids, to my husband. The beginning, when we moved there, that my parents bought that, they were very, very small. That refinery was very small; and, all of a sudden, in our eyes, it grew, it grew and it grew, and they took over. They took over, and whatever they did, whatever they were spilling, they always told us, "It never leaves the fence. It never leaves the fence." It was a chain link fence. They always thought that we were dumb because they said that everything was kept in their own property, that it never

> left the fence, but we lived across the street and we knew better, but they didn't care. They didn't care.

Testimony of Rebecca Zamora, April 28, 2008, Tr. 215:3-18. Thelma Morgan testified, "Well, I felt like I was losing it, you know, because you're stretched out . . . I just stayed emotionally stressed, and stress can be really harmful to you, you know, physically and also mentally . . . ." Testimony of Thelma Morgan, April 28, 2008, Tr. 232:9-12. Rosalinda Armadillo testified to the mental harm she suffered as a result of Defendants' conduct, "Well, constantly, during the nighttime and during the daytime also, we experienced a lot of smells, like I say, especially—well, it's horrible smelling those odors and being in the area for some while because, apparently, we can't do anything about it, you know. So, even if we complain, they won't hear us or anything." Testimony of Rosalinda Armadillo, April 29, 2008, Tr. 66:11-19. She went on to explain:

> One time, I talked to one of the police officers and they told me to go ahead and call in, but like I say, they will not go out there to pick us up. They would just tell us to stay inside and go ahead and cover all the cracks with towels, but not thinking that we're still running that unit and we're inhaling all that, and that stays inside the house. It goes in our clothes. It goes in our food. It goes in everything. So, it stays there for days and days because we have window units, until we figured it out, because I was so sick for—probably, I stayed sick for six months during a row with headaches, chest pains, thinking I was going to get a heart attack, problems swallowing. A lot of times, we had a lot of loose stools. It could be a lot of things, you know, and it wasn't only me. It was the whole family, the whole family.

Id. at 66:22-67:11

Betty Whiteside testified regarding the toll that constantly smelling fumes took on her daily life:

> Yes. I always keep masks in my car, because I would go to work in the morning at 6:30, and I would leave at 6:00 because I had to be at work at 6:30, and sometimes I would smell the fumes and I

> didn't really have insurance at the time because I had to let my insurance go because it got too high and I couldn't afford it. So, what I did, I invested in humidifiers. I put them in the bedroom, the living room, and in the hallway, and I always kept my windows closed because I didn't want to get any, you know, smells from the refinery in the house, so I kept my—in fact, I went as far as nailed my windows down. So even when I had guests that come over there, they wouldn't raise the windows, you know because we had a central air and heating unit, but the humidifiers helped me to be able to stay there because, one time, I did have problems and I went to Dr. Bobby Howard, and he was the one that suggested that since I didn't have insurance to go to a doctor, he suggested that I get the humidifiers to, you know, help me breathe because, sometimes, you would have a hard time breathing, but I always kept the masks. I would go to Wal-Mart and buy the masks, and, you know, I would just make it a habit, when I'd go in and out of the house, I would always put it on, you know, and I kept it in the car and kept them in the house.

Testimony of Betty Whiteside, April 29, 2008, Tr. 103:3-104:1. The fumes were so bad in the Hillcrest neighborhood that she sent her father to live with her sister in Houston so that he would not get sick. *Id.* 104:18.

Diana Linan, a teacher at the school in the neighborhoods, described "the gas – like gas smells, sweet gas smell." Testimony of Diana Linan, April 29, 2008, Tr. 177:17. Smelling the odors caused her to suffer itchy watery eyes, itchy throat, and nosebleeds. One day, she checked her blood pressure thinking maybe that had caused her nose to bleed; however, her blood pressure was normal. *Id.* at 180:12-19.

Similarly, Joel Mumphord testified that living near the refinery in the Hillcrest neighborhood was "scary," that his "life was turned upside down," and that "we was always in distress." Testimony of Joel Mumphord, April 29, 2008,Tr. 221:19 and 232:1.

C. Testimony About Other Types of Harm

Harm to the community members is not limited to noxious odors or mental harm. Neighbors of the refinery testified to a number of harms such as devaluation of their property and

damage to their plants and trees. According to Rebecca Zamora, "Well, it devalued our property. We could never sell it, not that we really, really wanted to leave our home, but nobody would buy it. My next-door neighbor kept her for sale sign—I don't know—months and months, and not even one person would buy her home, not even one person . . ." Testimony of Rebecca Zamora, April 28, 2008, Tr. 216:7.

Ms. Zamora continued, "Also, the properties, they were contaminated. We lost rose bushes, citrus trees. My husband used to plant vegetable gardens, and I don't know how they got our telephone number but they called. The health department called us and told us to throw away all the vegetables that we had, to throw them away and not to eat them, because they were contaminated." *Id.* at 216:20-22. Rosalinda Armadillo testified that the fumes killed plants on her property as well as her pets, "I've lost three pets that we've had within the years. We don't know. We've taken them to the vet, and, you know, they can't explain why they died or anything. Another thing is that there's been birds that we've had outside and they also die. Plants, I have to redo the whole thing over again, because I used to have rose bushes and they all died on me. All I have right now is just greenery stuff that lasts there through the winter." Testimony of Rosalinda Armadillo, April 29, 2008, Tr. 63:11-19. Betty Whiteside also testified about damage to landscape stating:

> it was hard to grow any vegetables, hard to—my dad, he loved growing fruit trees. He had one fruit tree out of – I don't know how many trees he planted – that did bear fruit one year and then, after that, you know, it stopped bearing . . . he thought it was from the refinery because, you know, so much would settle on the cars. You know you would have residue that would settle on the cars, and, you know, we just really thought that it would settle there, and the grass never did grow. We've always had weeds, you know. We never have been able to have carpet grass, you know, like we planted grass, planted grass, but only weeds would grow for some reason, you know, and some of the other neighbors around there, they would have luck, you know, with flowers and with grass, but

> we just never did have good luck there, and we still don't have good luck there.

Testimony of Betty Whiteside, April 29, 2008, Tr. 101:1-26). Joel Mumphord also complained of landscape damage:

> Well, you couldn't grow vegetables. Your trees would be—would turn like a dark brownish color. Our red roof is like a blackish red discoloration. It was supposed to be red, but it's not no more. Film. You can wake up in the morning and find film on your car. Take a little pad right here and, you know, you just don't know what you're experiencing day in and day out. I mean, it was thick film that you would find on your cars and your roof, your leaves, your trees. Your grass would turn different colors. Your peaches that you try to grow, you couldn't eat them, anything like that, whatever. So, it wasn't safe to—to plant or plant a garden or anything. So it was—it just wasn't safe enough to do that.

Testimony of Joel Mumphord, April 29, 2008, Tr: 229.1-16.

D. Health Risks Associated with Benzene Exposure

The health risks associated with benzene exposure are well known and indisputable. The community members request that the Court take judicial notice of the commonly accepted short term health effects of benzene exposure including irritation of exposure sites, headache, dizziness, drowsiness, rapid or irregular heartbeat, vomiting, stomach irritation and long-term health effects of benzene exposure including decrease in red blood cells, anemia, irregular menses, shrinking of the ovaries, bone marrow damage, and various cancers including leukemia. *See, e.g., Facts About Benzene*, Centers for Disease Control and Prevention, http://www.bt.cdc.gov/agent/benzene/basics/facts.asp.

ARGUMENT AND AUTHORITIES

I. Community Members are "Victims" under the CVRA

The Crime Victim Rights Act defines a victim as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). As remedial legislation, the CVRA "is to be construed broadly so as to achieve the Act's objective." *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006). The objective of the CVRA is to dramatically rework the criminal justice system by giving those affected by crime valuable rights, including but not limited to, an independent voice in criminal proceedings. *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006).

The Court should grant the community members' motion for two reasons that have never before been ruled upon by this Court. First, the CVRA's definition of "victim" requires a movant to show only that he was "harmed" as a result of an offense. Previously, the Court has held the community members to a higher standard than is required by the CVRA. Specifically, the Court has required that a movant establish "health effects" in the form of medically diagnosed physical injuries from CITGO's crimes. But the CVRA does not require proof of medically diagnosed adverse health effects to obtain victim status – only "harm." 18 U.S.C. § 3771(e). Testimony already in the Court's record shows that the community members have suffered a variety of harms because of CITGO's crimes, including breathing noxious fumes, mental harm including being scared, and the inability to enjoy basic joys of homeownership such as being able to keep a garden.

Second, even assuming arguendo that the victims have not – yet – manifested medically diagnosed physical injuries from CITGO's criminal emissions, the community members have undoubtedly been placed *at risk* of suffering such injuries. Being placed at risk as the result of a crime is – in and of itself – a "harm" that triggers CVRA victim status. Accordingly, the community members should be recognized as victims.

A. Criminally Forcing Community Members to Breathe Noxious Gases is a Harm Sufficient to Trigger the CVRA Victim Status.

Based on arguments advanced by CITGO, this Court previously concluded that the community members were not "victims" of CITGO's crimes because they had failed to document specifically manifesting medically diagnosed physical injuries. But proof of a physical injury simply is not the test victims must meet under the CVRA. CITGO has advanced a test that is more appropriate to state court personal injury claims – civil cases in which injured persons are parties with full rights to discovery and recovery. To impose such a demanding requirement that is not contained in the CVRA is not the proper way to decide the question.

For the purposes of the CRVA, "the term 'crime victim' means a person directly and proximately ***harmed*** as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (emphasis added). "If the criminal behavior causes a party direct and proximate ***harmful effects***, the party is a victim under the CVRA." *In re Stewart,* 552 F.3d 1285, 1288 (11th Cir. 2008) (emphasis added). Relying on CITGO's arguments, the Court searched for evidence of physical manifestations of harm in the form of medically documented physical injury. The Court's opinion is replete with the term "injury" instead of "harm." The community members respectfully submit that the Court's analysis is incomplete, because nothing in the CVRA requires proof of physical injury – much less a medical diagnosis - to receive victim status. Because the community members suffered a multitude of harms, including mental harms, they are and should be recognized as "victims."

Courts have used a two part analysis to determine whether a person affected by crime meets the definition of crime victim under the Act: (1) that harm would not have occurred but for the criminal conduct, and (2) that the causal nexus between the criminal conduct and the harm sustained is not so remote in time or fact as to be unreasonable. *See, e.g., United States of*

America v. Atlantic States Cast Iron Pipe Co., et al., 612 F. Supp. 2d 453, 471 (U.S. Dist. N.J. 2009) *citing United States v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997). The *Vaknin* Court specifically urged Courts to use "commonsense inference" in making the determination whether sufficient causal nexus exists to award restitution to victims. *Vaknin,* 112 F.3d at 590. It should be noted that *Vaknin* is a decision interpreting the Victim and Witness Protection Act, 18 U.S.C. § 3663 (VWPA). The standard of causation under VWPA and the CVRA is the same, and several Courts have followed the *Vaknin* Court's analysis in determining victim status. *See, e.g., Atlantic States,* 612 F. Supp. 3d at 472.

Determining who are the victims of environmental crimes can be difficult, as noted by the Court in *Atlantic States.* The Court stated "One of the chief salutary purposes of the crime victims' rights statutes, such as the CVRA and the restitution statutes, is to provide victims with dignity and respect in the criminal justice process. . . . That purpose is defeated if causation allegations are so attenuated in relation to the offense of conviction that the alleged victims are effectively turned into litigants, defending against contentions that intervening forces or their own actions contributed to their harm." *Id.* at 545. In this case, the community members are victims under the CVRA because they have undeniably suffered harms: breathing bad odors, inability to sleep, being scared, living in a near constant state of distress, burning itchy watery eyes, nosebleeds, dead plants, being unable to control their exposure. The CVRA requires that the court can reach this straightforward conclusion, without imposing on innocent victims the requirement that they produce the testimony of expert witnesses in multiple, technical subject matter areas (i.e., toxicology, epidemiology, environmental monitoring, and medicine, just to name a few).

Determining "crime victim" status in the context of environmental crimes should not be a full-blown exercise in epidemiology. Instead, the determination should be done in a non-technical fashion, such as fraud cases where courts have readily conferred victim status on every individual defrauded by a defendant without burdening the victims with having to prove their status through expert testimony. *See, e.g.,* Starr, et al., *A New Intersection: Environmental Crimes and Victims' Rights*, 23 NATURAL RESOURCES & ENVIRONMENT 41, 43 (2009); *In re W.R. Huff Asset Mgmt. Co., LLC, 409 F.3d 555, 559 (2d Cir. 2005).* Using the "commonsense inference" standard suggested in *Vaknin* makes sense in the context of environmental crime. *Vaknin,* 112 F.3d at 590. Such a treatment of victims would satisfy the causal nexus requirement of the CVRA while accomplishing the statute's purpose of providing victims dignity and respect during the criminal justice process. And commonsense plainly reveals that the community members have been harmed in this case by being forced to breathe unpleasant, noxious gases.

In this case, the United States identified as "victims" the community members, who were harmed by breathing noxious gases – i.e., air containing chemical emissions from CITGO's knowing illegal use of two massive tanks (tank 116 and tank 117) without proper emissions controls at the Defendants' Corpus Christi, Texas refinery over ten years from January 1994 to May 2003. In support of finding the community members to have been harmed, the United States provided extensive testimony from persons living in the neighborhoods adjacent to the CITGO refinery that they had been forced to breathe noxious gases contaminated by CITGO. The United States further produced evidence as to the health effects they personally suffered when they inhaled chemical emissions from the tanks. The United States also provided scientific evidence that the chemicals emitted from the tanks were capable of causing those health effects as well as direct evidence that the chemical emissions inhaled by the victims were traced back to

CITGO tanks 116 and 117. The Government also produced circumstantial evidence that the health effects occurred at the same time the victims inhaled the same noxious odors that were traced back to the CITGO tanks.[1]

Nonetheless, at CITGO's urging, the Court assumed the Government had to show that the community members had manifesting health injuries that had been medically diagnosed and that was proved to be solely caused by CITGO's crimes in order for them to be recognized as CVRA "victims." However, breathing noxious gases as a result of crime is – in and of itself – a "harm" that triggers victim status under the CVRA, regardless of whatever physical ailments may or may not be medically diagnosed at some undetermined time in the future. No one would voluntarily choose to breathe noxious gases. When CITOGO criminally forced the community members to do so, it harmed those members – meaning that they were victims of the crime.

The question the Court had to decide in making its crime victim ruling is not what medical or other consequences ultimately flowed from those harms. CITGO no doubt will argue that the periodic exposures suffered by the community members at the hands of CITGO could be considered relatively small by toxicological standards. Nonetheless, it is undisputed that the community members endured those emissions for ten years. Periodic exposure to benzene of only one year is considered long-term exposure. *Facts About Benzene*, Centers for Disease Control and Prevention, http://www.bt.cdc.gov/agent/benzene/basics/facts.asp. And given that

[1] The crime of which CITGO was convicted under the Clean Air Act was failing to operate the tanks with the required emission controls in place. *See* 42 U.S.C. § 7413(c)(1). Unlike other environmental statutes (such as the Clean Water Act, that regulate the concentration of hazardous chemicals allowed in certain discharges), the Clean Air Act regulates how the equipment handling chemicals with potential for harmful air emissions is operated. The Clean Air Act recognizes that reliable measurement of the concentration of harmful chemicals after they are emitted into the ambient air is practically impossible. Therefore, the crime under the Clean Air Act is failure to properly operate equipment handling the chemicals before the chemicals are emitted to the air.

no sane person would voluntarily choose to breathe benzene-laden air, CITGO's criminal acts harmed those who were exposed to the air.

This Court's previous ruling contains the necessary predicates for finding that the community members were harmed. This Court ruled that the community members had been forced to breathe "unpleasant odors":

> In the present case, the Government has not adequately proven that tanks 116 and 117 are the specific cause of the alleged victims' health conditions. . . . Although the government has traced a few odors back to [CITGO's] tanks 116 and 117, the temporal connection between exposure and symptoms is generally not entitled to great weight. . . . Although tanks 116 and 117 may have caused *unpleasant odors*, there is no proof showing that the concentration of chemicals in these emissions rose to the level necessary to cause *health effects*.

U.S. v. Citgo Petroleum Corp., 2011 WL 1337101, at *3 (S.D.Tex. 2011) (emphases added).

This ruling finds that, as a result of CITGO's crime, the community members suffered the harm of (as it puts it) "unpleasant odors." Specifically, what this finding is based upon is, for example, undisputed evidence that on December 18, 1995 the Texas Commission on Environmental Quality (TCEQ) traced an odor event to the area of tanks 116 and 117 when a complaint from the Hillcrest area reported a "strong, pungent odor causing respiratory irritation." Dist. Ct. Doc. #690 at 6. Similarly, on November 7, 1996 the TCEQ investigated three separate complaints of odors that were also causing health effects. The initial complaint received at the TCEQ office involved a strong odor that was nauseating and making the complainant dizzy. Each of the other complainants reported similar symptoms and said the odor was getting stronger. The assigned investigator from the TCEQ also complained of dizziness, nausea and a headache from the odor event that was traced directly to tanks 116 and 117. *Id.* at 6-7.

But in spite of such evidence, this Court – following a legal standard advanced by CITGO -- nonetheless refused to grant the community members victim status because they did

not establish ultimate "health conditions" or "health effects" that were **solely** caused by CITGO's crimes. Nothing in the CVRA limits those who are crime victims to those who go on to suffer provable, adverse health effects, and nothing in the CVRA imposes a sole causation standard on victims. The Court's position has essentially grafted onto the statute a requirement that does not exist.

CITGO's legal standard adds a whole separate layer of analysis that is nowhere contained in the CVRA. CITGO could just as easily argue that in a fraud case, in which an investor manages to recoup his money, unless he suffers a nervous breakdown or mental collapse he has not been "harmed" as a result of the fraud. But the CVRA nowhere requires such additional, collateral consequences. Just as a financial investor who has been defrauded is the "victim" of a fraud, so too here a community member who has lost the ability to breathe uncontaminated air is the "victim" of an environmental crime. The collateral consequences can be sorted out later, if necessary, at restitution hearings and the like. But proof of collateral consequences is not a pre-requisite to "victim" status.

The CVRA's plain language leads directly to this conclusion. Congress used the broad term "harm," which is generally defined as "physical *or mental* damage." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2006) (emphasis added). If Congress wanted to limit the crime victims protected in the statute to those who were *physically* injured (i.e., those who suffered adverse health effects), it could have easily written such a limitation into the statute. It did not do so.[2]

[2] Nor did Congress impose a sole causation standard on victims. The CVRA requires only that the crime be a direct and proximate cause of harm – not the sole cause. Otherwise joint criminals could always escape responsibility by pointing a finger at other culprits.

This Court has substantial evidence that the "unpleasant" odors caused clear mental harm to those affected by CITGO's crime. Of course, an "unpleasant" odor is one that a person would want to avoid. But the unpleasantness is significant in this case. To provide but one of many possible examples, Ms. Cantu (one of the community members bringing this motion) testified: "I would get depressed a lot because I was always wondering, with the extent of the odors and the flares, I would wonder if we were going to wake up the next morning because, sometimes, we would even get the odors inside through our AC unit." Dist. Ct. Doc. 690 at 15 (*citing* Tr. May 1, 2008, p.121: 1-8). The community members had no control over the chemicals CITGO spewed into the air around their homes and their workplaces. This caused them fear and distress – i.e., it *harmed* them.

"In the absence of clearly expressed legislative intention to the contrary, the plain language of the statute is to be recognized as conclusive." *Fiber Sys. Int'l., Inc. v. Roehrs*, 470 F.3d 1150, 1157 (5th Cir. 2006). When interpreting a statute, "a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Contrary to CITGO's argument, this Court's inquiry should have come to an end when it found that the defendant's crimes caused the community members to breathe "unpleasant" noxious gases -- thereby causing emotional harm. *See, e.g., Crawford v. National Lead Co.*, 784 F.Supp. 439, 444 (S.D. Ohio 1989) (emotional distress claim allowed to proceed based on unlawful emission of uranium and other harmful substances).

The legislative history makes clear that Congress intended for courts to give the CVRA's definition of "crime victim" a generous construction. After reciting the definition-of-victim language at issue here, one of the Act's two co-sponsors explained that it was "an intentionally *broad definition* because all victims of crime deserve to have their rights protected . . . ." 150 Cong. Rec. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). The description of the victim definition as "intentionally broad" was in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. *See Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1015-16 (9th Cir. 2006)(discussing significance of CVRA sponsors' floor statements). The provision at issue here must thus be construed broadly in favor of the community members; it should be construed to include mental harms such as the uncertainty and fear of being made to breathe noxious odors, the inability to keep a simple garden or trees in the neighborhoods, or watching children and the elderly suffer when the fumes are present.

In analyzing this very case, environmental law experts Judson Starr, Brian Flack, and Allison Foley concluded that "all residents who claim that they were adversely affected by the emission releases from CITGO's refinery would likely have victim status under the CVRA." Starr, et al., *A New Intersection: Environmental Crimes and Victims' Rights*, 23 NATURAL RESOURCES & ENVIRONMENT 41 at 44 (Judson Starr was the first Chief of the Environmental Crimes Section of the United States Department of Justice.). The community members respectfully submit that this conclusion is correct and that they should be recognized as victims.

B. Criminally Inflicting A Risk that Community Members Will Suffer Future Adverse Health Consequences Is Sufficient "Harm" to Trigger the CVRA.

In its previous ruling, this Court has also never considered whether the risk of future health harms – or simply the fear of a risk of future health harms - is sufficient harm to trigger

the CVRA. Accordingly, the community members present that new argument to the Court. Congress obviously intended for crimes involving risk of harm to victims to be covered by the CVRA. Accordingly, the community members should be recognized as victims on this basis as well.

In its earlier ruling, this Court followed the suggestion of CITGO that the Government had to prove actual medically diagnosed health manifestations in order to demonstrate that an individual was a "victim" of its crimes. But any suggestion that the CVRA requires a showing of a diagnosed adverse health effect removes a broad swatch of criminal statutes from the CVRA's coverage. The most important criminal environmental statutes are written in terms involving knowing ***endangerment.*** *See* 42 U.S.C. § 7413(c)(5)(A) (Clean Air Act); 42 U.S.C. § 6928(e) (RCRA); 33 U.S.C. § 1319(c)(3)(B) (Clean Water Act). Under these statutes, it is enough to move forward with a prosecution to show that someone has been endangered – not that they have developed actual health effects. Congress was aware that it would take years (if not decades) for diseases caused by some environmental crimes to manifest; consequently, the crime consists of endangerment rather than creation of a disease. This is an entirely different standard than the civil tort analysis advanced by CITGO.

In this case, CITGO was convicted of violating the Clean Air Act. Specifically, the jury found CITGO "knowingly operated a new stationary source, an oil water separator, which may emit a hazardous pollutant, benzene, that is tank 116 at the Citgo East Plant Refinery, without an emission control device; to wit, a fixed or floating roof to prevent the emission of benzene into the environment." Superseding Indictment, Count IV. Thus, the crime involved releasing a known carcinogen – benzene and other chemicals[3] - into the environment. It is well-documented

[3] Evidence presented by the government established that tanks 116 and 117 contained a

that benzene exposure can cause devastating health problems that run the gamut from eye irritation to cancer depending on the frequency, duration, and amount of exposure. *See, e.g., Facts About Benzene,* Centers for Disease Control and Prevention (2005), http://www.bt.cdc.gov/agent/benzene/basics/facts.asp; *Pocket Guide to Chemical Hazards: Benzene,* National Institute for Occupational Safety and Health (2010), http://www.cdc.gov/niosh/npg/npgd0049.html. Indeed, it is for this reason that emissions of benzene are heavily regulated. In short, exposing people to benzene is (to put it mildly) risky.

In this case, on the days in which CITGO criminally released benzene into the air in violation of the Clean Air Act, it placed the community members at risk. The fact of this risk is confirmed by the undisputed facts that neighbors experienced bad smells in their neighborhoods, eye irritation, asthma like symptoms, nosebleeds, and digestive ailments. Using commonsense inference, this is enough to confer victim status on anyone who was in the neighborhoods adjacent to the refinery. Of course, the offenses of which CITGO was convicted were the release of toxins into the air surrounding the refinery; on the days in which CITGO released toxins into the air, neighbors experienced bad smells, burning eyes, burning noses, sore throats, burning lungs, dizziness, vomiting, nausea, fatigue, and headaches, all of which are consistent with benzene exposure; the effects were immediate and not removed in time from the toxic releases. An element of the offense is that CITGO knew that it was releasing "hazardous" materials – that is, it was placing people in danger. It makes no sense to deny victim status to those whom CITGO knowingly placed in harm's way.

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chemical cocktail that included not only benzene, but also ethyl-benzene, toluene, 1, 2, 4 tri-methyl-benzene, xylenes (total), styrene, 1, 3 butadiene, methyl-butyl ether and a host of other hazardous chemical compounds. See Government Exhibit SH-36 and SH-37. The individual chemicals, in particular the BTX compounds (benzene, toluene, ethylbenzene, xylene), 3-butadiene and the chemical mixture would have adverse health effects on persons exposed to the chemicals. Government Exhibit SH-33.

If the charges in this case do not confer rights on victims, then most environmental crimes will effectively become "victimless" crimes. Indeed, if such an approach is accepted, crime victims' rights will be swept away in many other contexts.

Consider, for example, a prosecution for attempted murder under 18 U.S.C. § 1113. If the defendant intends to kill and shoots a bullet at a person's head, the fact that the bullet whistles past the person's ear rather than striking and killing him would, in CITGO's view, mean that the victim had suffered no "health effect" and therefore had not been harmed. Under CITGO's reasoning, attempted murder is a "victimless" crime because the target faced mere risk of death, rather being injured or killed. Yet in this attempted murder example, the shooter has obviously placed his target in jeopardy, creating "victim" status.[4] Likewise, CITGO's criminal releases of dangerous substances have placed the surrounding communities in jeopardy – jeopardy of disease and even the death. The members of those communities should be recognized as victims.

Other examples of incongruous results generated by CITGO's approach are easy to find. The federal criminal code defines a "crime of violence" as including any felony offense "that, by its nature, involves a substantial ***risk*** that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (emphasis added). Many violent crimes under this section would become "victimless" if CITGO's analysis is followed because risk of physical force being used is not the same as an actual physical injury being suffered. Similarly, the federal criminal code provides a 25-year prison term for a drive-by shooter, that is, for any person "who, in furtherance . . . of a major drug offense and with the

[4] It makes no difference whether the target was aware that the bullet was fired at him or not. A person is "victim" of an attempted murder, even if he is sleeping when the bullet is fired and he continues to sleep after the attack. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2006) (discussing example of sleeping attempted murder victim).

intent to intimidate, harass, injure, or maim, fires a weapon into a group of two or more persons and who, in the course of such conduct, causes grave ***risk*** to any human life . . . ." 18 U.S.C. § 36(b)(1) (emphasis added). This crime, too, is rendered victimless through the analysis of CITGO: if the drive-by shooter fails to hit someone, then no one has suffered adverse health effects.

As one final illustration, consider the crime of assault within federal jurisdiction. 18 U.S.C. § 113. This crime is committed not only by injuring a person but also by "a *threat* to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (emphasis added). For instance, waving a knife in someone's face is an assault. *See* WAYNE R. LAFAVE, CRIMINAL LAW 737 (3d ed. 2000) (in contrast to battery, "[a]ssault, on the other hand, needs no such physical contact; it might almost be said that it affirmatively requires an absence of contact"). But following this Court's reasoning, assault is a victimless crime when it involves a mere "threat" to inflict injury rather than actual physical injury.

CITGO's position equates "harm" under the CVRA with immediate physical injury. This approach constricts the CVRA to offenses that involve direct physical injury – leaving out other crimes including attempted murder, drive-by shootings, assault, stalking, possession of child pornography, child endangerment, drunk driving, mailing threatening communications, and a whole host of crimes where the essence of the offense is placing a person at risk physically, psychologically, or economically.[5] There is simply no basis for concluding that Congress

[5] Likewise, the approach would extend victim's rights to completed financial crimes that result in out-of-pocket financial losses, but would seemingly exclude crimes in which the financial

wanted the "harm" necessary to trigger the protections of the CVRA narrowly confined to those producing provable physical injury.[6]

Congress presumably would not have wanted the uninjured target of an attempted murder or drive-by shooting to be denied victim status simply because of the mere fortuity of the criminal's bad aim with his gun. At a minimum, the target of an attempted murder or drive-by shooting suffers an invasion of his right to personal security, thereby suffering harm. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2006) ("'[S]ocial harm' may be defined as the negation, *endangering*, or destruction of an individual, group, or state interest which was deemed socially valuable. Thus, the drunk driver and the attempted murderer of the sleeping party have *endangered* the interests of others, and have caused 'social harm' under this definition") (emphases added) (internal quotation omitted). Indeed, a whole host of offenses commonly thought to be covered by the Crime Victims' Rights Act rest on this chain of reasoning. A victim of assault, for example, who has had a knife waved in his face has not suffered direct physical injury but surely qualifies for protection under the Act because of the psychic toll and invasion of his sense of security that such a crime entails.[7] Similarly here,

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loss had yet to materialize – i.e., theft of a credit card in which the stolen card had not yet been used or an attempt to cash a forged check that is thwarted by an alert bank employee.

[6] The examples given above all involve specific crimes that are largely defined in terms of risk of a particular *result* occurring. But many other crimes are defined in terms of risk through the *mens rea* they employ. For example, crimes of recklessness involve conscious disregard of a risk to another person. *See, e.g., United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005). Crimes of negligence involve failing to be aware of a risk that a reasonable person should have been aware of. The Government's analysis also seems to turn many of these crimes into victimless crimes, as the elements of these offenses are defined in terms of risk.

[7] A psychic toll is not the only sort of intangible harm that can establish a "victim." For example, an affront to dignity by itself has been found to confer "crime victim" status under the CVRA. *See United States v. Goodwin*, 287 Fed.Appx. 608, 2008 WL 2906515 at *1 (9th Cir. 2008) (referring to a child as a "victim" under the CVRA of the crime of the possession of child pornography).

CITGO's crimes – which extended over years and years – have imposed a psychic toll on the surrounding community that creates a cognizable harm.

Being exposed to a risk is harm to a victim. As one legal scholar has explained, "We have an interest in being safe – in being securely free of the risk of substantive harm; that interest is set back when I am endangered, even if no substantive harm ensues." R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 949 (2005). Another scholar concluded that all persons "have a legitimate interest in avoiding unwanted risks. A [defendant] who inflicts a risk of harm on another damages that interest, thus lowering the victim's baseline welfare." Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) (answering "yes" to the question posed in the title). As a result, being exposed to a risk of disease – such as benzene induced cancer – is clearly a harm:

> If harm is [defined as] a setback to a legitimate interest, it should not be difficult to see why risk of harm is itself a harm, for it is not difficult to make the case that exposure to risk is a setback to a legitimate interest. . . .[I]t is clear from the fact that no normal, nonsuicidal person would choose a higher rather than a lower chance of developing cancer that there is a perfectly commonsensical way in which being exposed to an increased risk of developing cancer is a setback to a person's most fundamental interests.

Id. at 972-73.

Even setting aside the issue of whether the Government provided sufficient proof of health effects to the community members, the fact that they (and their children) must live their lives in the shadow of having been placed in imminent danger creates far more than sufficient harm to obtain the protection of the Crime Victims' Rights Act. *See Crawford v. National Lead Co.*, 784 F.Supp. 439, 443 (S.D. Ohio 1989) (improper release of uranium and other harmful substances created emotional distress sufficient to allow tort action to proceed). In the words of

one of the drafters of the CVRA, "Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives." 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Feinstein). The community members have been placed in considerably more danger than, for example, the uninjured victim of someone displaying a knife. Accordingly, this court should recognize them as crime victims under the CVRA.

The community members have suffered not only the psychic and emotional harm of being placed in danger by CITGO's crimes, but more tangibly by their obvious need to take responsive remedial measures – which some of the community members have done. *See, e.g.,* Testimony of Rosalinda Armadillo, Tr. 68:3-9 (sleeping with handkerchief over her face to protect herself from the fumes); Testimony of Betty Whiteside, 103.3-104.1 (keeping masks in her car to wear to protect herself from the fumes). This Court has argued that "there is no proof showing that the concentration of chemicals in these emissions rose to the level necessary to cause health effects. Due to these circumstances, the proof of causation before this Court is inconclusive." *U.S. v. Citgo Petroleum Corp.*, 2011 WL 1337101, at *3 (S.D. Tex. 2011). But that is small consolation to the petitioners, who must continue to watch and see if those "health effects" – that is, deadly cancers – develop.

It is evident from the medical records in this case, that the defendants' crimes have forced the community members to undertake medical *monitoring* to see whether adverse health conditions have developed as a result of their exposure to the benzene released by CITGO. That is, regardless of whether CITGO's crimes are solely responsible for their medical *treatment,* the community members have sought medical help because of various symptoms that are known to be caused by benzene exposure such as burning watering eyes, nosebleeds, and digestive problems. The need for monitoring causing compensable harms is well known in the courts.

See, e.g., Klier v. Elf Atochem North America, Inc., 658 F.3d 468, 472 (5th Cir. 2011) (discussing class action settlement providing for compensation based on mere "proximity-to-plant and exposure standards" rather than adverse health effects); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (allowing medical monitoring where as a proximate result of exposure to a harmful substance a "plaintiff suffers a significantly increased risk of contracting a serious latent disease"). Such medical monitoring here is the direct result of the defendant's crimes. The community members must now remain ever vigilant for its symptoms in their bodies by virtue of the fact that the defendant has criminally exposed them to benzene.

Courts of Appeals have plainly held that the need to take remedial measures because of a crime is "direct and proximate harm" from that crime. A good illustration comes from *United States v. De La Fuente*, 353 F.3d 766 (9th Cir. 2003), which held that the U.S. Postal Service was a "crime victim" of the offense of mailing threats to injure contained in 18 U.S.C. § 876(c). In *De La Fuente*, the defendant mailed a letter containing a harmless white powder, attempting to simulate anthrax. When the letter broke open at a mail processing center, the Postal Service was forced to evacuate the center, losing the work time of its employees. Because these losses were "directly related to the offense conduct," the Ninth Circuit concluded the Postal Service was "directly and proximately harmed" under the restitution statute, 18 U.S.C. § 3663A(a)(2).[8] As a result, the Postal Service was a "victim" of the offense and eligible for restitution for its employees' lost time.

The loss to the Post Office found to be sufficient harm in *De La Fuente* pales in comparison to the loss that the community members have suffered. The community members

[8] The same "direct and proximate" harm language found in the restitution statutes appears in the CVRA. In drafting the CVRA, Congress simply borrowed the phrase from the restitution statutes. *See* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 857.

must spend the rest of their lives attempting to respond not to a substance that proved to be harmless, but rather to toxic substances such as benzene – substances known to be deadly. *See, e.g.,* 42 U.S.C. § 7412(b) (listing benzene as harmful substance). Hopefully, none of the community members will die from benzene-caused cancers. Even if that is the happy final outcome, they have been harmed by CITGO's crimes.

Courts have accorded "victim" status as the result of the need to respond to harmless substances when a defendant's crime necessitated the response. *See, e.g., United States v. Quillen*, 335 F.3d 219, 226 (3rd Cir. 2003) (rejecting defendant's argument that "the expense of this expeditious (but in hindsight literally unnecessary) response did not result in an actual loss directly resulting from his conduct"). If responding to a harmless substance creates victim status, surely the community members' need to respond to the release of benzene in their neighborhoods qualifies them as victims. Moreover, the community members must respond not merely to an economic loss (i.e., the loss of postal workers' time) but to a serious danger to their health and, indeed, their lives.

Finally, this case is similar to *In re: Parker* in which W.R. Grace exposed residents of Libby, Montana to asbestos. The District Court held the residents lacked the required causal nexus between their harm (increased risk of pulmonary diseases) and W.R. Grace's conduct. *United States v. W. R. Grace,* 597 F. Supp. 2d 1157, 1159 (D. Mont. 2009). However, the Ninth Circuit reversed, holding that the increased risk of future disease was enough to confer victim status on the town's residents. *In re: Parker,* 2009 U.S. App. Lexis 10270 (9th Cir. 2009). The fact that the CITGO victims' proven medical injuries "could" have been caused by something else should not be an obstacle to victim status when a wrongdoer has clearly created a risk of those injuries. Any other conclusion would give environmental criminals (such as the corporate

defendant before this Court) carte blanche to create harms without the victims having a chance to respond. This Court should reach the same conclusion as the Ninth Circuit and recognize the community members as victims.

In sum, the community members have plainly been "harmed" by CITGO's crimes and are therefore protected "victims "under the CVRA.

CONCLUSION

For all these reasons, the community members are "victims" entitled to rights under the CVRA. Accordingly, the Court should hold that they have the right to be heard at sentencing under 18 U.S.C. § 3771(a)(4). The community members request that the Court rule on their motion expeditiously such that their request to be designated as victims does not cause further delay in these proceedings.

Respectfully submitted,

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Motion for Admission Pro Hac Vice Pending

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion of Community Members to be Declared Victims Under the Crime Victim Rights Act has been served on counsel of record identified below.

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Dated July 5, 2012

Paula Pierce

CERTIFICATE OF CONFERENCE

I certify that I have conferred with all parties by and through their counsel of record. The United States expresses no opinion on this motion. All other parties are opposed.

Paula Pierce

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
	§	
V.	§	**CRIMINAL ACTION NO. C-06-563**
	§	
CITGO PETROLEUM CORPORATION,	§	
CITGO REFINING AND CHEMICALS	§	
COMPANY, L.P.,	§	
Defendants		

PROPOSED ORDER ON MOTION OF COMMUNITY MEMBERS TO BE DECLARED VICTIMS UNDER THE CRIME VICTIM RIGHTS ACT

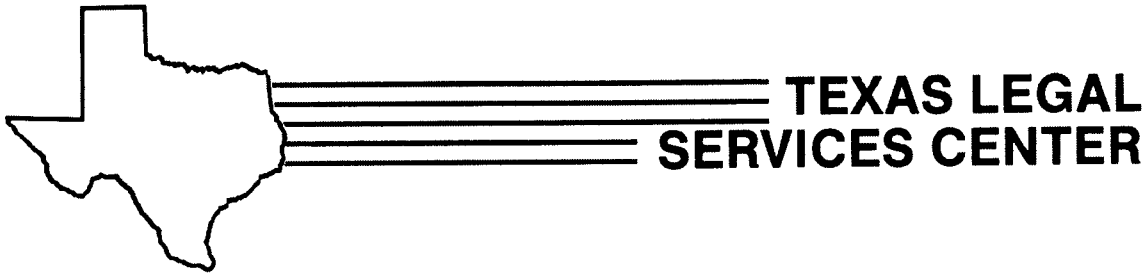
On this day, the Court considered the Motion of Community Members to be Declared Victims Under the Crime Victim Rights Act and all responses thereto. The Court finds as follows:

James Galloway, Joel Mumphord, Rosalinda Armadillo, Jewell Allen, Mavis Branch, Feliciano Cantu, Robe Garza, Diana Linan, Thelma Morgan, James Shack, Jean Salone, Julian Garcia, John Garcia, and Betty Whiteside are hereby recognized as victims in this action under the Crime Victim Rights Act.

Signed this ____ day of _____, 2012.

_____
JOHN D. RAINEY
Judge Presiding

ATTACHMENT
PROPOSED ORDER ON MOTION OF COMMUNITY MEMBERS TO BE DECLARED VICTIMS UNDER THE CRIME VICTIM RIGHTS ACT



July 5, 2012

ATTN: Clerk of the Court – Filings
United States District Court
Southern District of Texas
Corpus Christi Division
1133 North Shoreline
Corpus Christi, TX 78401

Re: No. C-06-563; United States vs. CITGO Petroleum Corp., et al.

Dear Sir or Madam:

I am enclosing the following for filing in the above referenced case:

- Motion of Community Members to be Declared Victims Under the Crime Victim Rights Act
- Attachment: Proposed Order
- Motion of Community Members for an Expedited Ruling on Their Motion to be Declared Victims Under the Crime Victim Rights Act
- Motion and Order for Admission Pro Hac Vice for Paul Cassell

Please note that I am an e-filer. I attempted to file the above-referenced documents via the EM/ECF e-filing system; however, the system will not accept an e-filing from a non-party in a criminal case. I contacted the e-filing help desk where I was told to file the documents by mail and that under these circumstances you would accept a paper filing. Please do not hesitate to contact me if you have any questions regarding this filing.

Sincerely,

Paula Pierce

Paula Pierce
Attorney
Federal Bar No. 8954
Direct phone: 512-637-5414

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